No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To
The First Interim Report
Of The Special Master

BRIEF OF AMICUS CURIAE NORTHERN CHEYENNE TRIBE IN SUPPORT OF MONTANA'S EXCEPTIONS

JEANNE S. WHITEING
Attorney at Law
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 444-2549
jwhiteing@whiteinglaw.com

Counsel for Amicus Curiae
Northern Cheyenne Tribe

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS[1]

The Northern Cheyenne Tribe files this amicus brief in support of Montana's Exceptions to the First Interim Report of the Special Master. The Northern Cheyenne Tribe is a federally recognized Indian tribe,[2] occupying a 444,000 acre reservation along the Tongue River in southeastern Montana. The Tongue River is one of the interstate tributaries of the Yellowstone River addressed in the Yellowstone Compact and is at issue in this case. The Tribe previously filed an amicus brief in opposition to Wyoming's motion to dismiss.

The Tongue River is the eastern boundary of the Northern Cheyenne Reservation and serves as the main source of the Northern Cheyenne Tribe's water rights for its reservation lands. Lands along both sides of the Tongue River were initially withdrawn for the Tribe in 1881. The Northern Cheyenne Reservation was formally established by Executive Order in 1884 and was extended to the "middle of the channel

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[1] No person or entity other than amicus authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk simultaneously with this amicus brief.

[2] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218, 40220 (August 11, 2009).

of the Tongue River" in 1900.[3] As the result of the withdrawal of lands in 1881, and the subsequent establishment of the Tribe's Reservation in 1884 and 1910, water was reserved by and for the Northern Cheyenne Tribe. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 595-96 (1963).

The Tribe's Indian reserved water rights or *Winters* rights, including its rights in the Tongue River, were resolved pursuant to a Compact with the State of Montana, which was ratified and approved by the Montana Legislature in 1991, MCA 85-20-301, and by the Congress in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374, 106 Stat. 1186 (1992). The Compact was subsequently entered as a decree by the Montana Water Court in 1995. *In the Matter of the Adjudication of Existing and Reserved Right to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42K-J, & 43P* (Water Court of the State of Montana, Yellowstone River Division, Special

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[3] Executive Orders of November 26, 1884 and March 19, 1900, 5 *Indian Affairs: Laws and Treaties* 860-61 (Charles J. Kappler, ed., Government Printing Office, 1904). The boundaries of the Reservation, and the Tribe's ownership of and title to the lands within the boundaries were ratified and confirmed by section 1 of the Northern Cheyenne Allotment Act, Act of June 3, 1926, 44 Stat. 1690. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 (1976).

Northern Cheyenne Compact SubBasin), *decree entered* September 26, 1995.

Under the Northern Cheyenne-Montana Compact, the Northern Cheyenne Tribe has the right to 32,500 acre feet of water in the Tongue River from a combination of direct flow, storage from the Tongue River Reservoir and exchange water, and a separate contract right for 7,500 acre feet of Tongue River Reservoir storage water.[4] In the Compact, the Tribe agreed not to use its Tongue River direct flow right in a manner that impacts certain main stem state water rights with a priority before 1909, and pre-1973 state water rights off the reservation on tributaries to the Tongue River. Article II.A.2.s.ii, MCA 85-20-231.

The Yellowstone River Compact, Pub. L. 82-231, 6 Stat. 663 (1951) provides in Article VI that:

> Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

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[4] The Tribe also has water rights in Rosebud Creek, a Montana tributary to the Yellowstone River, and 30,000 acre-feet of storage in Big Horn Reservoir, located on the Big Horn River, one of the four interstate tributaries addressed in the Yellowstone Compact. None of these water sources is at issue in the present matter.

Nevertheless, given the nature of the Tribe's water rights under the Northern Cheyenne-Montana Compact, the outcome of this case has the potential for impacting the manner in which the Tribe can use its water rights. Thus the Tribe has an interest in ensuring that its water rights are fully protected under the Yellowstone Compact, and that the Compact is not interpreted in a manner that adversely affects the Tribe's rights.

ARGUMENT

I. The Special Master's Decision Allowing Increased Consumption for Pre-1950 Rights is Inconsistent with the Compact

The Northern Cheyenne Tribe supports the State of Montana's position that Article V.A of the Yellowstone Compact ("Compact") provides protection only for the depletions or consumptive use existing as of 1950 on irrigated lands in Wyoming. This position is supported by the language of Article V and the overall structure of the Compact.

Under Article V of the Compact, a three-tier system of water rights is established. Article V.A provides that "appropriative rights to the beneficial uses of water . . . existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." "Beneficial Use" is defined under Article II.H as "that

use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Article V.B then allocates the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of June 1, 1950" first to supplemental water for pre-1950 rights, and then to new uses after 1950. Thus, under the structure of Article V, together with the definition of beneficial use in Article II.H, the "depletions" of water from beneficial uses as of January 1, 1950 are "to continue to be enjoyed" and are protected as the first-tier water rights as the permanent baseline condition.

We agree with Montana that this structure does not allow for protection for increased depletions or consumptive use as a result of increased irrigation efficiencies. Rather, the additional consumption is a new use not protected by the Compact, and is water that is subject to the allocation under Article V.B. In addition to the reasons set out in Montana's brief, this interpretation is further supported when considered with reference to the definition of "Divert" and "Diversion" in Article II.G of the Compact.

Article II.G defines "Divert" and "Diversion" as "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or the tributary from which it is taken." This definition reinforces the structure of the compact as one incorporating the concept of consumption and depletion in the protections afforded to Montana's pre-1950 uses.

Therefore, when the Special Master framed the question as "whether the Compact restricts pre-1950 Wyoming appropriators to the amounts of water that they were *consuming* rather than *diverting* as of January 1, 1950," First Interim Report at 64, it is not clear there is a difference under the definition of diversion in Article II.G as water taken from the stream and not returned, i.e. consumed. Given the clear definition of the term "diversion" in the Compact, the restrictions on Wyoming's pre-1950 rights must be determined with reference to the amount of water taken from the stream and not returned.

Further, the Special Master found it informative that the apportionment in Article V.B of the Compact is based on "divertible flow" rather than consumptive use. *Id.* While the divertible flow concept has no application to the rights protected under Article V.A, and the term is not used in the Compact, in the context of Article V.B, "divertible flow" would be determined with reference to the definition in Article II.G – the amount of water not returned to the river or tributary from which it is taken.

Finally, the Special Master considered issues of practicality in his analysis, noting that Wyoming would need to establish administration measures to track increases in consumption by pre-1950 appropriators. First Interim Report at 87. However, no additional type of administration to monitor consumptive use would be required that is not already required under the apportionment in Article V.B. The allocations in Article V.B "take into account return

flows and uses of them, as well as original runoff." S. Rep. No. 883, 82nd Cong. 1st Sess., Joint App. at 13. If such administration can be undertaken to track return flows and uses of them, as well as original runoff for purposes of Article V.B, it does not seem to be a significantly greater burden to undertake the same type of administration for purposes of Article V.A.

II. Policy Considerations Relating to Water Conservation Do Not Support the Master's Conclusion

The First Interim Report correctly states that: "When a water user increases its water efficiency and thus its consumption, the change can reduce the amount of water that flows back into the waterway and is available for downstream water users – even though the amount that is diverted does not increase." First Interim Report at 55. Downstream water users often rely on return flows from irrigation upstream. Particularly at the end of the irrigation season in southeast Montana, it is not unusual that the only water available is from return flows. Indeed, the use of return flows is a fundamental aspect of the doctrine of prior appropriation. Therefore a reduction in the amount of return flows would have a definite and very significant impact on available water to fulfill pre-1950 rights in Montana.

The Special Master concludes that "While the rule [that the Compact does not ban increased consumption on existing acreage as a result of improved

efficiencies] reduces the security of downstream appropriators who rely on return flow, it also encourages increased conservation (a goal that both Wyoming and Montana, like most western states, share) by giving farmers an incentive that they otherwise would not have to invest in improved irrigation techniques." First Interim Report at 87. Thus, under the Master's analysis, the policy consideration of encouraging increased conservation on Wyoming acreage balances the reduction of flows to pre-1950 Montana water users downstream.

The idea that increased efficiency allowing for more water to be consumed on the same land is not a usual conservation measure, however, in the sense that it does not result in less depletion of the resource. While increased irrigation efficiency may benefit an individual water user, it does not result in overall conservation of the resource. Instead, it results in a greater consumption of water by the individual user, and less water or no water being made available for downstream pre-1950 rights. Conservation policies that aim to reduce depletions of the resource would not likely encourage this result. Indeed, it is an equally important conservation goal to encourage the multiple use of water. "Maximizing the number and extent of uses promotes efficiency," and "[r]ecapture and reuse of water encourages conservation and maximum utilization of water." David H. Getches, Water Law in a Nutshell (Thomson/West 2009) at 139.

However, no one suggests that efficiency should be discouraged – only that if improved irrigation techniques are put into place, the resulting increased consumption should not be allowed to unilaterally change Montana's allocation under the Compact, or transfer that use to Wyoming to the detriment of Montana.

CONCLUSION

The Special Master's recommendations should be adopted by the Court with the exception of the recommendation that increased consumption due to improved irrigation efficiencies on lands under pre-1950 water rights is allowed under the Compact, and with the exception of the recommendation that exhaustion of intrastate remedies is required before Wyoming's obligations under the Compact become operative.

Respectfully submitted,

JEANNE S. WHITEING
Attorney at Law
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 444-2549
jwhiteing@whiteinglaw.com

Counsel for Amicus Curiae
Northern Cheyenne Tribe

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